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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 821

UNITED ELECTRICAL CONTRACTORS ASSOCIATION, et al.,
Petitioner,

—v.—

ARNOLD ORDMAN, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on September 23, 1966.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is printed herein, Appendix A, page A-1. The opinion of the District Court for the Southern District of New York is reported at 51 CCH Lab. Cas. P. 19, 761 (p. 33, 949) (1965).

Jurisdiction

The judgment of the Court of Appeals was entered on September 23, 1966. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

1. Does the District Court have the jurisdiction to review an abuse of power by the General Counsel of the National Labor Relations Board manifested by his refusal to issue a complaint?

2. Does the General Counsel have the absolute, unreviewable right to refuse to issue a complaint where there is a conceded *prima facie* unfair labor practice violation of the Labor Management Relations Act?

3. If Sec. 3 (d) of the Labor Management Relations Act, 1947 as amended (29 U.S.C. Sec. 153 (d)) gives the General Counsel the unrestricted and arbitrary mandate to issue or not to issue complaints, then is that provision of the statute an abridgment of the constitutional rights of the charging party?

Statement of the Case

At various times between March 28, 1963 and June 19, 1964, unfair labor practice charges were filed by plaintiffs electrical contractors with the Regional office for the Second Region of the National Labor Relations Board in New York City. The charges alleged violations by Locals 3 and 25 of the International Brotherhood of Electrical Workers in that:

(a) there was picketing at a secondary employer's place of business, and

(b) coercion, threats and attempts to compel the employer to cease doing business with co-plaintiff's

union, Industrial Workers of Allied Trade, Local 199, and sub-contractors, and to recognize and deal only with the picketing unions.

In each of the factual (10) situations, a *prima facie* showing of a violation of the Act was made by the charging party and notwithstanding no complaints were issued (except in one case where the complaint was issued and then withdrawn without the consent of the charging party). The Regional Director and General Counsel refused to give plaintiffs an opportunity to present their evidence, to be heard, and to refute any contradictory evidence elicited by the Board's investigator.

Plaintiffs' complaint before the Court seeks a judgment declaring the rights of the parties hereto and a mandatory injunction compelling the General Counsel and/or the National Labor Relations Board to issue complaints based on unfair labor practice charges filed by plaintiffs pursuant to the Labor Management Relations Act.

The District Court dismissed the complaint on the ground that the Court lacks jurisdiction over the subject matter.

The Court of Appeals affirmed the judgment of the District Court.

The District Court (Hon. John M. Cannella) based its decision on the following principles of law:

1. The refusal of the General Counsel to issue a complaint may not be reviewed.

2. The Federal Declaratory Judgment Act is not applicable because it is precluded by an applicable regulatory statute.

3. The Administrative Procedure Act is inapplicable, the judicial review of the General Counsel's refusal being precluded by the N.L.R.A.

Reasons for Granting the Writ:

1. That the United States Supreme Court has never before decided this important question of Federal law.

The Court of Appeals in its opinion stated:

> "* * * the district courts may not review the day-to-day exercise of the discretion given to the General Counsel in the issuance of Board unfair Labor practice complaints * * *."

This in effect gives the General Counsel the absolute, unreviewable right, no matter how arbitrary or contrary to the intent of the statute, to refuse to issue a complaint.

That this is contrary to the Congressional intent is evident from the remarks of Senator Taft.

In explaining the position which the General Counsel would occupy within the framework of the act (LMRA), he stated on the floor of the Senate just prior to its passage over the presidential veto (93 Cong. Rec. 7538):

> "All that we have done with the Board is to make a separation of powers. Under this bill the Board is judicial. It is judicial today: Its counsel will be a prosecutor. He will not have any extraordinary powers—*nothing like the power of the Attorney General of the United States* who decides whether criminal actions shall be brought against anyone in the United States. Under this bill, the Counsel will have the right to make the decisions as between employer and employees but *his decision will be subject to the decision of the Board and above the Board, the Courts; and we have given the Courts greater power to look into the decisions of the Board and to provide for the redress of any injustice.*" (Italics mine.)

2. That the United States Court of Appeals, Second Circuit, by its decision herein has decided an important question of law in direct conflict with the decisions of the Third Circuit, in *Marine Engineers Beneficial Association* v. *N.L.R.B.*, 202 F.2d 546, *cert. denied*, 346 U.S. 819; and *Leeds & Northrup Company* v. *N.L.R.B.*, 357 F.2d 527.

In one of the complaints in the case at bar (Surf Hunter Electric) a complaint was issued. Thereafter, the Regional Director dismissed the complaint over the objections of the charging party and without affording the charging party a hearing on his objections. These acts by the Board (in the Third Circuit cases) were held to be arbitrary and capricious and reviewable by the District Court.

3. That the decisions and opinions herein are in direct and abrupt conflict with the constitutional guarantees of procedural due process.

The question of General Counsel's power and authority to make arbitrary decisions without regard to the statutory intent and in violation of procedural due process is of great public concern and should be definitively answered by this Court. In the argument before the Court of Appeals counsel for respondent, in answer to a query from the Court, stated that the General Counsel had the unreviewable right to refuse to issue a complaint, where there was a violation of the statute, on the sole ground that the party being charged was a brother-in-law of the General Counsel.

Does this not constitute a violation of the rights guaranteed under the constitution?

Fay v. *Douds*, 172 F.2d 720.

The jurisdiction of the state courts has been pre-empted by the LMRA. Now we are being told that relief to which we are concededly entitled may be withheld arbitrarily, capriciously and by whim of the General Counsel.

Is the complaining party to be left with a wrong without a remedy? *Local 100 of the United Association of Journeymen and App.* v. *Borden,* 373 U.S. 699.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: November 10, 1966.

Respectfully submitted,

LEON BRICKMAN,
Counsel for Petitioner.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 13—September Term, 1966.

(Argued September 22, 1966 Decided September 23, 1966.)

Docket No. 29879

—o—

UNITED ELECTRICAL CONTRACTORS ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

—v.—

ARNOLD ORDMAN, *et al.*,
Defendants-Respondents.

—o—

Before: WATERMAN, MOORE and ANDERSON,
Circuit Judges.

—o—

Appeal from order and judgment, United States District Court for the Southern District of New York, Cannella, *J.*, dismissing plaintiffs-appellants' complaint. Affirmed.

—o—

LEON BRICKMAN, Brooklyn, N. Y.; N. George Turchin, New York City; Spector & Meissner, Brooklyn, N. Y., for Plaintiffs-Appellants.

ARNOLD ORDMAN, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Asst. General Counsel; Solomon I. Hirsh, Lawrence M. Joseph, Attorneys, National Labor Relations Board, for Defendants-Respondents.

—o—

PER CURIAM:

Appellants filed unfair labor practice charges with the National Labor Relations Board. The General Counsel of the Board declined to issue complaints upon the charges. Plaintiffs instituted an action in the United States District Court for the Southern District of New York against the General Counsel and the members of the Board seeking there a declaratory judgment setting forth plaintiffs' rights under the Labor Management Relations Act as charging parties whose charges did not result in the filing of NLRB complaints, and further seeking a mandatory injunction to compel the General Counsel to issue unfair labor practice complaints on their charges.

The defendants-appellees moved to dismiss the complaint on the ground that the court was without jurisdiction over the subject matter. The court below granted the motion and this appeal followed.

We agree with the court below that upon petitions for a declaration of rights by disappointed charging parties the district courts may not review the day-to-day exercise of the discretion given to the General Counsel in the issuance of Board unfair labor practice complaints, and we affirm the result reached below. The opinion of the district court is reported at 51 CCH Lab. Cas. ¶ 19,761 (p. 33,949 (1965).

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